IN THE INCOME TAX APPELLATE TRIBUNAL "D", BENCH MUMBAI

BEFORE SHRI R.C.SHARMA, AM
&
SHRI RAM LAL NEGI, JM

ITA No.676/Mum/2015
(**Assessment Year :2010-11**)

Asst. CIT CEN CIR 8(2) 6th Floor,R.No.658 Aayakar Bhavan M.K.Road, Mumbai – 400 020	Vs.	Shri Subhodh Menon 501, Swapnalok Marve Road, Malad (W) Mumbai – 400 064
PAN/GIR No.AAAPM6916D		
(Appellant)	..	**(Respondent)**

ITA No.2776/Mum/2015
(**Assessment Year :2010-11**)

Asst. CIT CEN CIR 8(2) 6th Floor,R.No.658 Aayakar Bhavan M.K.Road, Mumbai – 400 020	Vs.	Shri P.N. Ramaswamy Feeroj Tower, Sheetal Apartment, Ramchandra Lane, Kanchipada Malad (W) Mumbai – 400 064
PAN/GIR No.AAAPR4696R		
(Appellant)	..	**(Respondent)**

Revenue by	Shri Tejveer Singh & Shri Abhijeet Deshmukh
Assessee by	Shri S.E. Dastur
Date of Hearing	**28/09/2018**
Date of Pronouncement	**07/12/2018**

आदेश / O R D E R

***PER R.C.SHARMA (A.M)*:**

These are appeals filed by the Revenue against the order of CIT(A)-50, Mumbai dated 29/12/2015 for A.Y.2010-11 in the matter of order passed u/s.143(3) of the IT Act.

2. Common grounds have been taken by the revenue in both the cases even though different assessees. Ground taken in the case of Subhodh Menon reads as under:-

> *"1.On the facts and in the circumstances of the case, and in law, the Learned CJT (A) erred in deleting the addiion made u/s 56(2)(vii)(c) of the Act of Rs.3,01,25,58,196/- being the difference between alleged fair market value of share (Rs. 1538.64 per share) of Dorf Ketal Chemicals India Pvt. Ltd. and the subscribed value of shares (Rs.100 per share) without appreciating the fact that the valuation of shares is to be done prior to allotment of shares.*
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> *2. Without prejudice to the above, the Learned CIT(A) has also erred in not considering the provisions of section 17 of the Act in the instant case in view of the fact that the assessee is the director of the company and was benefitted by allotment of shares at lower rates.*
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> *The appellant prays that the order of the CIT(A) on the above ground be set aside and that of the Assessing Officer be restored.*
>
> *The appellant craves leave to amend or alter any ground and/or add new grounds which may be necessary."*

3. As the facts and circumstances in the case of both the assessees are same, both the appeals were heard together and are now being decided by this consolidated order.

ITA No.676/Mum/2015

4. The brief facts of the case, inter alia, are that the assessee is director of M/s. Dorf Ketal Group cases and derives income from salary, income from house property and income from other sources. The

assessee filed his return of income on 31.07.2010 showing total income of Rs.24,23,44,903/-. Subsequently the return was revised on 11.07.2011 declaring the total income at Rs.25,04,16,549/-. The assessment was completed u/s.143(3) of the Act on 28.03.2013, assessing the total income at Rs. 3,26,32,85.240/-. In the assessment order the A.O stated that the assessee at the beginning of the year was holding 7,28,664/- shares of a closely held company namely M/s Dort Ketal Chemicals India Pvt. Ltd. having face value of Rs.100 per share. During the year the assessee increased his stake to 28,22,696 shares by acquiring 20,94,032 shares @Rs.100/- per share i.e. the face value for a consideration of Rs.20,94,03,200/-. M/s Dorf Ketal Chemicals India Pvt. Ltd. is closely held company of the assessee, who is also a director of the company. The A.O worked out the fair market value of the share at Rs.1438.64 per share. The difference in share value was brought to tax u/s 56(2}(vii)(c) **of** the Act.

4. The A.O. further stated that without prejudice to the above, if it is held that section 56 is not applicable, the above transaction is to be considered u/s 17 of the I T Act in view of the fact that the assessee is working as a director of M/s Dorf Ketal India Ltd., and is in receipt of income from salary. The shares allotted to assessee, being a salaried employee, is to be treated either as perquisite or profit in lieu of salary. It is stated that as per the ratio laid down in the case of CIT vs D.R Pathak (99 ITR 14) the benefits, amenities and advantages which assessee gets

from his employer are to be taken u/s 17 of the Act. Accordingly, AO made addition of Rs.3,01,25,58,196/- u/s.56(2)(vii)(c) of the IT Act.

5. By the impugned order, CIT(A) deleted the addition by considering the remand report, after observing as under:-

> *14.0 I have carefully examined the facts of the case, the stand taken by the A.O in the assessment order and in the remand report, the grounds of appeal, the written submissions and further rejoinder filed by the appellant during the hearing proceedings.*
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> *14.1 The issue under consideration came up for decision before Hon'ble ITAT, Mumbai in the appellant group case namely Sudhir Menon (HUF) for the A.Y 2010-11 wherein at para 5.1 of the order of the Hon'ble ITAT. Mumbai held as under:-*
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> *"5.1 In view of the foregoing, therefore, the provisions of section 56(2)(vii)(c) in the facts and circumstances of the case, shall not apply and, hence, the amount of Rs.27,89,02,160/- cannot be assessed as income in the hands of the assessee on the ground of in adequate consideration".*
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> *14.2 Since the facts in the case of the appellant and the facts in the case of Sudhir Menon (HUF) are identical, the decision rendered by the Hon'ble ITAT Mumbai in the case of Sudhir Menon (HUF) is applicable mutatis mutandis in the case of the appellant. Some of the salient observations made by the Hon'ble ITAT vide para No. 4.2 in the case of Sudhir Menon (HUF) for the A.Y 2010-11 are reproduced as under:*
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> *(1) Though the word property occurring in section 56(2)(vii) defined to mean capital assets which includes shares and securities but the shares come into existence only on their allotment.*
>
> *(2) Receipt of the property is only on the allotment on which date the shares, a specified property comes into existence. Till such allotment the shares do not exist.*
> *(3) The plea of the rights under reference being not a property specified under the provision or the provision being sought to be applied by the revenue to a non-existing property is without basis.*
> *(4) Section 56(2)(vii) never intended to cover a transaction of this nature i.e. where the shares are offered to the existing share holders though below 4heir market value on rights basis.*
> *(5) Valuation date under rule 11U(j) is the date of receipt of the property and the shares are received on their allotment.*

(6) Bonus shares or in the case of allotment of additional shares there is neither increase nor decrease in the wealth of the shareholder or of the issuing company and the percentage holding of the share-holder remains constant. What transpires is that a share gets split in the same proportion for all the share-holders. The ITAT also explained the same by stating that it would be akin to somebody exchanging a one thousand rupee note for two five hundred or ten hundred rupee notes. There is, accordingly, no question of any gift of or accretion to property; the share-holder getting only the value of his existing shares, which stands reduced to the same extent.

14.3 The following sentences in para No. 4.3 of the ITAT order is also relevant.

"We say so as to extent the value of the property in the additional shares is derived from that of the existing shareholding, on the basis of which the same are allotted, no additional property can be said to have been received by the shareholder. The Revenue argues otherwise, contending that the fall in the value of the existing holding, if any, is not to be taken into account or reckoning. The argument is equally misconceived, i.e., as that by the assessee qua the applicability of the provision to bonus shares. It fails to take into account the nature of the transaction. The exemplify, shares in the ratio (say)1:1 are offered for subscription at the face value of Rs. 100/- as against the current book value of Rs. 1,500/- (say). The moment a right share is allotted, the book value shall fall to Rs. 800/- per share. It is easy to see that a new share partakes a part of the value of the existing share, which is only on the basis of the underlying assets on the company's books. The excess (over face value), or Rs. 1,400/-, gets apportioned over two shares as against one earlier, which is already the shareholders' property. This is also the basis and the premises of the decisions in the case of Dhun Dadabhoby Kapadia vs CIT (1967) 63 ITR 651 (SC) and H. Hoick Larsen vs CIT (1972) 85 ITR 285 (Bom), relied upon and referred to by the parties before us. As long as, therefore, there is no disproportionate allotment, i.e. shares are allotted pro-rate to the shareholders, based on their existing holdings, there is no scope for any property being received by them on the said allotment of shares; there is no scope for any property being received allotment of shares; there being only an apportionment of the value of their existing holding over a large number of shares".

14,4 In the light of the above observations, the IT AT in the case of Sudhir Menon (HUF) for the A.Y 2010-11 held that no addition u/s 56(2)(vii)(c) of the Act would thus arise in view of the undisputed facts in the instant case and the assessee succeeds. Considering the fact that the issue involved is identical in the case under consideration as well as in the case of Sudhir Menon (HUF) for the A.Y 2010-11, following the decision of Hon'ble ITAT, Mumbai, it is hereby held that the provisions of section 56(2)(vii)(c) of the Act is not applicable to the facts and circumstances of the appellant's case.

14.5 It is also the case of the A.O. that if the provisions of section 56(2)(vii)(c) of the Act is held to be not applicable, then the same should be considered for taxability as perquisite u/s 17 of the Act. The contention of the A.O is not acceptable since the ITAT while deciding the case of Sudhir Menon (HUF) held that there is no inadequate consideration involved. The taxability u/s 17 of the Act will arise only if there is Jnadequate consideration which can be treated as perquisite. Since the Hon'ble ITAT clearly held in the case of Sudhir Menon (HUF) that no addition is possible on account of inadequate consideration, it is therefore not possible to assess the same as perquisite u/s 17 of the Act. Since the facts are identical the decision of Hon'ble ITAT, Mumbai is binding and the question of charging the inadequate consideration u/s 17 of the Act does not arise in the case of the appellant.

14.6 In the assessment order the A.O relied upon the decision of the Hon'ble Mumbai High Court in the case of D.R.Pathak [99 ITR 14]. As per the A.O the ratio laid down in the case of D.R.Pathak [99 ITR 14] that all benefits, amenities and advantages received by the employee from the employer are taxable as perquisite u/s 17 of the Act. The contention of the A.O is not correct. The issue involved in the case of D.R.Pathak [99 ITR 14] is whether City Compensatory Allowance is a permissible allowance u/s 10(14) of the Act. The Hon'ble Mumbai High Court held that the sole object of compensatory (city) allowance is to compensate Government Servants for extra expenditure which he will be called upon to bear by reason of his posting at particular place and therefore, it has jiexus with performance of duty of Government Servant and as such is permissible 10(14) of the Act. The decision cited by the A.O is not relevant to the facts of the appellant's case. Similarly in the remand report the Addl.C.IT relied upon the decision of IT AT, Mumbai in the case of Smt. Tripti Sharma [1 ITR (Trib.) 471]. The Addl. CIT mentioned that the shares allotted to the assessee by the employer company below prevailing market rate is taxable u/s 17(2) of the Act. The contention of the Addl. CIT is not acceptable for the following reasons. In the case of Smt. Tripti Sharma the assessee was granted under ESOP a right by way of a warrant to acquire shares of employer company on payment of Rs.212/- per share which was admittedly much below the prevailing market rate, but in the case of the appellant the additional shares are allotted to the shareholders including the appellant who happens to be the director in the said company. No shares have been allotted to the appellant under ESOP and in the appellant's case there is no admitted fact of allotted share value being lower than the market value as in the case of Smt. Tripti Sharma. In view of the above, the facts in the case of Smt. Tripti Sharma is distinguished.

14.7 While forwarding the remand report it is submitted by the Addl. CIT, Central Range-10, Mumbai that the department has not accepted the decision of the ITAT in the case of Sudhir Menon (HUF) and appeal against the order of ITAT is filed before the Hon'ble High Court of

Mumbai. In this regard it is stated that though it is the right of the department to contest the orders of the appellate authorities in higher forum as in this case the order of the ITAT, Mumbai is contested before the Hon'ble High Court of Mumbai, however, till such time either the operation of the order ITAT, Mumbai is stayed or reversed by the Hon'ble High Court of Mumbai, the decision of the ITAT, Mumbai is binding on all lower authorities. It is important to note that the decision of Hon'bie ITAT referred is rendered on the same facts in one of the group cases. Therefore, respectfully following the decision of the Hon'ble ITAT, Mumbai in the group case of i,e Sudhir Menon (HUF) for the A.Y. 2010-11, the grounds of appeal 2 to 5 are hereby allowed.

15.0 The appellant in ground No.6 (additional ground) contended that the A.O erred in not granting credit for TDS on salary amounting to Rs.7,43,13,801/- and on interest amounting to Rs.2,529 as claimed in the ROI by the appellant. In the remand report the AO as well as the Additional CIT., Central Range-10 have stated that the rectification.

6. Against the above order of CIT(A), Revenue is in further appeal before us.

7. It was argued by learned DR that assessee has allotted shares at a face value of Rs.100/- instead of Rs.1,538.64/- as per fair market value in the books of accounts of M/s. Dorf Ketal Chemicals India Pvt. Ltd., The learned DR further argued that the assessee has not disputed the fact that during the year the assessee received 20.94,032 shares of face value of Ra.lOO/- each on fresh issue of allotment of M/s Dorf Ketal Chemical (India) Pvt. Ltd., and paid a consideration of Rs.20,94,03,200/-. The assessee received these shares on 28.01.2010 i.e after 01.10.2009 the effective date from which the provisions of section 56(2)|vii)(c) comes into effect. The assessee also not disputed the valuation of the shares as on 31,03.2009 which is in accordance with Rule llUA(c) of the Income Tax Rules, 1962 and works out to Rs.1538.64 per share. The assessee

however stated that after the date of the issue of fresh shares the valuation of the shares has been drastically reduced with inclusion of the new contribution of capital. This argument of the assessee is however found not acceptable for the reason that the share value of the company has to be valued as on date of issue or prior to the issue date to determine the fair market value for the comparison of the reasonableness of the price for invoking provisions of section 56{2)(vii](c) of the Act. This has rightly been done in this case as there was no increase in the share capital or reserves Immediately before the issue date. As per learned DR, there is a difference of Rs.1438.64 per share between the fair market value and face value of these shares received by assessee which in value terms works out to Rs. 301, 25,58, 196/-. In view of the above, he contended that AO has justifiably made addition u/s.56(2).

8. On the other hand, learned AR relied on the order of the CIT(A) and placed on record, the order of the Tribunal in case of brother of the assessee. Shri Subhodh Menon HUF in ITA No.4887/Mum/2013 order dated 12/03/2014 wherein exactly similar issue was considered in detail by the Tribunal and issue was decided in favour of the assessee. He also invited our attention to the fact that CIT(A) has also relied on the order of Co-ordinate Bench in case of brother of the assessee, wherein facts were same.

9. We have considered rival contentions and carefully gone through the orders of the authorities below. We had also deliberated on the

judicial pronouncements referred by lower authorities in their respective orders as well as cited by learned AR and DR during the course of the hearing before us in the factual matrix of the case and found that issue under consideration is squarely covered by the order of the Tribunal in assessee's own case. The precise observation of the Tribunal was as under:-

> *"4.3 We may next examine if the provision, being ostensibly applicable, leads to any addition in the hands of the assessee whose shareholding gets – as a result of the transaction, in fact reduced from 4.98% to (as stated) 3.17%. The argument as well as the premise on which we found the issue of bonus shares as not applicable would, to the extent pari materia, apply in equal measure to the issue of additional shares, i.e., where and to the extent it is proportional to the existing share-holding. We may though, at the outset, clarify that the instant issue cannot be called a rights issue. Section 81 of the Companies Act, 1956 is not applicable to a private company (s.81(3)), so that it is firstly not obliged to issue shares to the existing shareholders only, and again, even so, on a proportionate basis. That apart, we state so as the scheme does not have a provision for the renunciation of rights by the existing shareholders. The same could thus at the option of the issuing company be offered for allotment to any other, i.e., whether existing shareholder or not. Thus, though the issue has elements of a right issue inasmuch as the offer is made in the first instance to the existing shareholders on the basis of their shareholding*
> *on proportional basis, the same cannot be strictly termed as one; the company appropriating that right, which could be offered to another. A rights issue, as informed by the ld. AR upon enquiry by the Bench, stands not defined either under the Companies Act or under the Securities Contracts (Regulation) Act, 1956. The company has, accordingly,*
> *correctly termed the issue, not satisfying all its parameters, as akin to a rights issue, before the ld. CIT(A), which the ld. AR was before us at pains to dislodge. Nothing, however, turns on the same, as would apparent from the foregoing discussion, and as we shall presently see in more detail. We say so as to the extent the value of the property in the additional shares is derived from that of the existing shareholding, on the basis of which the same are allotted, no additional property can be said to have been received by the shareholder. The Revenue argues otherwise, contending that the fall in the value of the existing holding, if any, is not to be taken into account or reckoning. The argument is equally misconceived, i.e., as that by the assessee qua the applicability of the provision to bonus shares. It fails to take into account the nature of the transaction. To exemplify, shares in the ratio (say) 1:1 are offered for subscription at the face value*

of Rs.100/- as against the current book value of Rs.1,500/- (say). The moment a right share is allotted, the book value shall fall to Rs.800/- per share. It is easy to see that the new share partakes a part of the value of the existing share, which is only on the basis of the underlying assets on the company's books. The excess (over face value), or s.1,400/-, gets apportioned over two shares as against one earlier, which is already the shareholders' property. This is also the basis and the premise of the decisions in the case of Dhun Dadabhoy Kapadia vs. CIT [1967] 63 ITR 651 (SC) and H. Holck Larsen vs. CIT [1972] 85 ITR 285 (Bom), relied upon and referred to by the parties before us. As long as,
therefore, there is no disproportionate allotment, i.e., shares are allotted pro-rata to the shareholders, based on their existing holdings, there is no scope for any property being received by them on the said allotment of shares; there being only an apportionment of the value of their existing holding over a larger number of shares. There is, accordingly, no question of section 56(2)(vii)(c), though per se applicable to the transaction, i.e., of this genre, getting attracted in such a case. A higher than proportionate or a non-uniform allotment though would, and on the same premise, attract the rigor of the provision. This is only understandable inasmuch as the same would only be to the extent of the disproportionate allotment and, further, by suitably factoring in the decline in the value of the existing holding. In the context of the example cited, by taking the difference at
Rs.700/- per share for such shares. We emphasize equally on a uniform allotment as well. This is as a disproportionate allotment could also result on a proportionate offer, where on a selective basis, i.e., with some shareholders abstaining from exercising their rights (wholly or in part) and, accordingly, transfer of value/property. Take, for example, a case of a shareholding distributed equally over two shareholder groups, i.e., at 50% for each. A 1:1 rights issue, abstained by one group would result in the other having a 2/3rd holding. A higher proportion of 'rights' shares (as 2:1, 3:1, etc.) would, it is easy to see, yield a more skewed holding in favour of the resulting dominant group. We observe no absurdity or unintended consequences as flowing from the per se application of the provision of s. 56(2)(vii)(c) to right shares, which by factoring in the value of the existing
holding operates equitably. It would be noted that the section, as construed, would apply uniformly for all capital assets, i.e., drawing no exception for any particular class or category of the specified assets, as the 'right' shares. No addition u/s. 56(2)(vii)(c) would thus arise in the undisputed facts of the instant case, and the assessee succeeds.
4.4 The foregoing arguments and premises would also meet and state the basis for our not accepting the Revenue's argument toward no cognizance being taken of the existing shareholding – on the strength of which only the additional shares are allotted to the assessee or the decline in their value consequent to the issue of additional shares in-as much as the same are not the subject matter of receipt, i.e., to which the provision pertains and is restricted to. It stood further contended before us that the ratio of the decision in the case of Dhun Dadabhoy Kapadia (supra) would be no

longer applicable, i.e., even in principle, so that the said decline would be of no consequence in view of the specific provisions being since incorporated under section 55 of the Act, providing for the cost of shares under such situations, as for example a nil cost for bonus shares. The capital asset received by the assessee (shares in the present case), it may be appreciated, are to be valued as on the date of its receipt. That is, it is only the asset received that is to be valued. In-as-much as therefore the value of the additional shares is derived - if only in part - from that of the existing shares, the decline in the value thereof cannot be excluded or ignored – though only by following the valuation method prescribed under the rules – in arriving at the property by way of additional shares received by the assessee. The provision of section 55(2)(aa) provides for the cost of a capital asset, being a share or security, which the assessee becomes entitled to subscribe to by virtue of his holding such a capital asset. In our view, the same, on the contrary, provides statutory support, i.e., in principle, to our decision in-as-much as it clarifies that the values of the two, i.e., the original and the additional financial assets (which is how the same are referred to in the said provision) are interlinked and, accordingly, a gain cannot be computed independent of each other. It is in fact in acknowledgment thereof that the Legislature has considered it proper and necessary to provide for determination of cost in such cases, i.e., for uniform application. The same though would operate for the purpose of computing capital gains, which would arise on the subsequent transfer of such assets. We have already noted an internal consistency between the two sets of provisions in-as-much as section 49(4) stands simultaneously incorporated to deem the value adopted or taken for the purpose of section 56(2)(vii) (or (viia)) as the cost of acquisition of the relevant asset (refer para 4.1). In fact, the argument becomes irrelevant in view of our decision holding that section 56(2)(vii) shall not have effect, irrespective of the value at which the additional shares are allotted, where and to the extent they are so on the strength of and against the existing shareholdings, made uniformly or subject to adequate pricing. Much was made before us of the Revenue not treating the transaction as a rights issue of shares, as well as of the power of the tribunal in entertaining such a plea, even where taken before it for the first time, including qua the admission of additional evidence. We have already clarified the same to be not a rights issue, i.e., in the strict sense of the term, also stating our reasons, on the basis of admitted facts, therefor. The plea is also rendered inconsequential in view of our afore-said decision. This would also meet the assessee's argument of it becoming, as a result of the transaction, poorer in-as-much as the value of his holding witnesses a decline after taking into account the payment made for the acquisition of the additional shares. The said argument thus, rather than detracting from lends further support to our decision. The assessee's argument, with reference to the shares in the resulting company received by a shareholder on demerger, which is without consideration, would thus also be of no moment. The same is again misconceived in-as much as the shareholder only receives the value

of his existing holding in the form of the shares in the resulting company. We have in fact already noted that these provisions, i.e.,
clause (vii), together with clauses (v) and (vi) preceding it, and clauses (viia) and (viib) following it, of section 56(2), exclude transactions of business reorganization, merger, demerger, etc. (refer para 4.2). As shall be noted, it is only the shares or interest in a company in which public is not substantially interested, arbitrage or leveraging of interest in which, being largely outside the public domain, that the provision/s seek to capture for tax purposes. A demerger stands, further, also specifically excluded from the definition of dividend per clause (v) of section 2(22).
4.5 We may next meet the various arguments advanced by either side. The assessee claims of section being not per se applicable as neither is there any transfer in its favour nor is the issuer-company the owner of the shares, which stand acquired by way of subscription. We are unable to appreciate the argument. How else, we wonder, is the issued capital in a company supposed to be acquired? The section nowhere stipulates
'transfer' as the prescribed mode of acquisition. The transfer of a capital asset is even otherwise a relevant consideration in respect of income by way of capital gains, chargeable u/s.45. A parallel, if at all, in-as-much as the provision, which is to be considered as valid, was required to be placed in perspective and within the scheme of the Act, could be drawn to the deeming provisions of its Chapter VI titled 'Aggregation of income and set off or carry forward of loss'. An investment or asset found not ecorded, wholly or partly, in the books of account maintained by the assessee (for any source of income), and in respect of acquisition or ownership of which he is unable to furnish a satisfactory explanation, i.e., as to the nature and source of acquisition, the value thereof or the excess (unrecorded) value, as the case may be, is deemed as the assessee's income. The apex court in Chuharmal vs. CIT [1988] 172 ITR 250 (SC) explained that the provision of section 110 of the Indian Evidence Act, 1872, raising a presumption of ownership in favour of the person in possession (in-as-much as possession is a prima facie proof of ownership) is applicable under tax jurisprudence as well, so that the onus to show that he was not the actual owner is upon such a person. It, accordingly, found nothing amiss in the charge to tax as income, the assets, properly valued, where
unexplained (or not satisfactorily explained) in terms of the nature and source of their acquisition. The principle stands in fact dwelt with and explained at length by it over a number of decisions even prior thereto. The receipt of money, speaking in the context of a credit entry appearing in the assessee's books of account, even as there was no provision corresponding to section 68 of the Act in the earlier 1922 Act, it explained, is itself an evidence against the assessee of being in receipt of income, so that the onus to show that it is not so is upon him (refer: A. Govinda Rajulu Mudaliar v. CIT (1958) 34 ITR 807 (SC); Sreelekha Banerji vs. CIT [1963] 49 ITR 112 (SC); Kale Khan Mohammad Hanif vs. CIT [1963] 50 ITR 1 (SC); CIT v. Durga Prasad More (1971) 82 ITR 540 (SC)). Section 68, on one hand, and sections 69/69A/69B/69C on the other are pari materia, both seeking explanation for the assets, being recorded in

the first case and not or only partly so in the other. No doubt, the onus under the latter category of sections is on the Revenue. However, the onus on the Revenue is limited only to showing the assessee to be the owner or in possession of the relevant asset. In fact, even this is to be regarded as discharged where it is able to exhibit circumstances that lead to the inference of the assessee being the owner, even as clarified by the apex court in K.P. Varghese (supra) (also refer C.K. Sudhakaran vs. ITO [2005] 279 ITR 533 (Ker)). The receipt of an asset by the assessee, and in his own right, is, on the other hand, the very basis or the edifice on which the provision of section 56(2)(vii) rests, so that it proceeds on the basis or the footing of the burden of the Revenue being satisfied. The receipt of a capital asset is accordingly made the basis or the condition for the charge to tax as income, unless falling under any of the excepted categories, and which it would be noted is a valid basis u/s. 2(45) r/w s.5 of the Act. It is this in fact that had led us to state earlier of the receipt (of an asset) as having been adopted as the basis or the condition of deeming as income u/s. 56(2)(vii) (or clauses (v) and (vi)), and of the provision as being on a firm footing. What the provision essentially does is to widen the scope of the afore-referred provisions of Chapter VI, which is essentially a statutory recognition of the rules of evidence, even further. The explanation referred to therein is dispensed with where the receipt is in respect of a capital asset, as defined, and, further, does not fall under any of the excepted categories in-as-much as the same is regarded as not normative or outside the realm of accepted human behavior, based on preponderance of probabilities (of human conduct). To argue of the receipt as being a synonym for transfer, or of it as not flowing from its owner, is, thus, inconsistent, both in the context of the provision as well as its clear language. Reference in this context was also made by the ld. AR to section 122 of the Transfer of Property Act, 1882 and section 25 of the Indian Contract Act, 1872. A transaction could be either with or without consideration. Consideration signifies a price, so that it is a case of transfer, which the impugned transaction is not, while if considered as without consideration, the transaction is void in law, being not a gift in-as-much as the company is not the owner of its shares. The argument seeks to support the contention that the transaction in order to qualify as valid in law has to be a case of transfer in-as-much as the consideration implies price, so that the word 'receipt' occurring in section 56(2)(vii) has to be read as a synonym for or equated with 'purchase' or 'transfer'. The shares under question being not acquired through transfer, the transactions falls outside the ambit of section 56(2)(vii). We are completely unimpressed. The argument, attractive on its face, fails miserably the moment the nature of the transaction, i.e., the allotment of the shares (through which the relevant shares stand acquired or received), upon which only the shares come into existence and are received by the allottee thereof, is clarified.The same has been subject to dilation and elucidation by the apex court inter alia in Shree Gopal and Company (supra) and Khoday Distilleries Ltd. (supra) relied upon by

the parties themselves before us. As stated explicitly in the former case, a share is a chose in action. A chose in action implies the existence of some person entitled to the rights, which are rights in action as distinct from rights in possession, and, until the share is issued, no such person exists. A share does not exist prior to its allotment, and in that sense comes into existence only on its allotment. Allotment of a share is only the appropriation of the authorized share capital, being un-appropriated, to a particular person. In nutshell, the difference between the issue of a share to a subscriber and a purchase of a share from an existing shareholder is the difference between the creation and transfer of a chose in action (refer pgs.865, 866). How could, therefore, purchase be equated with allotment? In fact, the purchase or transfer implies existence of a property, while the shares, where out of un-appropriated capital, come into existence only on their allotment. It becomes, thus, in the context of the provision, completely irrelevant and of no consequence that the shares in the issuing company are not its property, and that it does not become, therefore, any poorer as a result of the allotment of shares therein.

'Receipt' is a word or term of wide import, and would include acquisition of the subject matter of receipt – defined capital assets in the present context, by modes other than by way of transfer as well. We find no reason to limit or restrict the scope of the word 'receipt' in the provision to cases of 'transfer' only. Doing so would not only amount to reading down the provision, which the tribunal is even otherwise not competent to, being not a court of law, but reading it in a manner totally inconsistent with the unambiguous language and the clear intent (of the Legislature) conveyed thereby, but also its context as well as the drift of section, in complete violence thereto. In the case of issue of bonus shares (as also on emerger), no property is being conveyed to the shareholder in-as-much as the property therein is comprised in the existing shareholding of the allottee. There is as such no case of a gift; the shareholder only receiving his own property, albeit in a different form. A 'right' share, on the other hand, is placed differently. To the extent it is allotted to a person not against his existing shareholding or, even so, albeit disproportionately, there is, depending on the terms of the allotment, which is the mode of acquisition and, thus, it's receipt, scope for value or property being passed on to him, which cannot be said to be in lieu of or as recompense of his existing property. The section would, as afore-stated, therefore, apply, though the extent of income, if any, chargeable there-under would depend on the actual allotment and its terms. Thus, considering the assessee's case from this angle also leads us to the same conclusion.

We may at this stage advert to the erstwhile section 52 of the Act or, to put it more precisely, its interpretation as made by the apex court in K.P. Varghese (supra), on which heavy reliance was placed by the ld. AR before us. We have perused the judgment; its ratio/s being binding on us. Though the apex court per a detailed judgment discussed various aspects of the matter, referring to the official pronouncements explaining the provision, in the final analysis, what prevailed with it is that the provision, as being read and applied by the Revenue, exceeded its mandate. The

provision is not a charging section. As explained by it, it does not create any fictional receipt; does not deem as received something which is in fact not received. It merely provides a statutory best judgment assessment of the consideration actually received by the assessee, and brings to tax the capital gains on the footing that the FMV of the capital asset represents the actual consideration received by the assessee as against the consideration declared or disclosed by him. Accordingly, once it is established that the consideration actually received by the assessee is more than what is declared or disclosed by him, the Revenue is not required to show the precise extent of the understatement or the exact consideration received by the assessee – an impossible task in most cases. That is to say that unless, therefore, the primary condition of an inaccurate or incorrect disclosure or declaration; rather, an understatement thereof, was satisfied, the section, which again provided a surrogate measure in the form of the FMV of the relevant asset, as does section 56(2)(vii), could not be invoked. Not doing so would, in its words, would be to read into the statutory provision something which is not there. It is not difficult to see that the Revenue, in applying the provision of section 52(2) in the manner it did, i.e., without establishing the condition of

its invocation, was putting the cart before the horse. The process led to a fundamental flaw in-as-much as it proceeded to estimate – which is a process integral to assessment – something (consideration) that could not be said to exist, i.e., created a fictional receipt, which was beyond its scope. One could possibly argue that section 52(2) being no longer on the statute, all this is not relevant, and the abiding legacy of the decision, and the purpose for which it was referred to was inter alia its relevance on the principle of contemporanea expositio and the statement of the objects per the extant official communications. The argument is, in the context of the present case, misconceived. This is as we have firstly pointed out a

fundamental infirmity in the interpretation placed on or accorded to section 52(2) by the Revenue. Section 52(1), which again only enabled the A.O. to substitute the FMV as the consideration as against that declared by the assessee on transfer, subject to his having reason to believe that the transfer was effected with the object of evading or reducing the

liability to tax u/s.45, was not adversely commented upon by the apex court. It is easy to see that all the official pronouncements notwithstanding, the apex court would or rather could not have opined in the manner it did but for the fundamental flaw observed by it as-much as the provision has to be read within its legal framework, giving a purposeful

meaning to its clear words. No such infirmity inflicts the section under reference or has been shown to exist. We have already found receipt as a valid basis for deeming income, which is supported by the principles of common law jurisprudence. That 'income' under the Act is a word or term of wide import, and would include anything which comes in or results in gain is also well settled. The provision casts exceptions, again as afore-noted, where in the normal course considerations other than

financial/monetary are at play, so that it applies to commercial transactions for which an arm's length basis can be reasonably regarded as the normative basis for conducting or concluding transactions. Further, even the official pronouncements, which are not to be read as one does a statute, do not in any manner detract from or operate to dilute the rigor of the section; the same itself explaining it as an anti-abuse measure. The reason is not far to fathom; it being well neigh impossible, even as observed by the apex court in K.P. Varghese (supra), for the Revenue to exhibit the actual consideration that exchanges hands. Why, this in fact is the basis for the transfer pricing legislation, which is by now an integral part of the tax law of most countries. That the provision may operate harshly in some cases is no reason for it to be not read in the manner it ought to be, i.e., given its clear mandate. The proposition, apart from being well settled, has been sought to be advanced before us by the Revenue by relying on the decision in the case of Turner Morrison & Co. Ltd. vs. CIT [1953] 23 ITR 152 (SC). In fact, even the assessee's case is limited to right shares only, and does not speak of any other capital asset covered by the provision, including shares and securities. We have already explained that to the extent the shares subscribed to are right shares, i.e., allotted pro-rata on the basis of the existing share-holding (as on a cutoff date), the provision, though per se applicable, does not operate adversely. A disproportionate allotment, which cannot, therefore, strictly be regarded as right shares, though could be allotted under a rights issue, would however invite the rigor of the provision, i.e., to that extent. It is to be noted that the fresh shares rank parri passu with the existing holding and, therefore, we see no reason why the provision shall not apply with full force in such cases.

Conclusion

4.6 We may finally discuss the issue from the stand point of interpretation of statutes, which was urged before us with reference to some case law, viz., C.W.S. (India) Ltd. vs. CIT [1994] 208 ITR 649 (SC); CIT vs. J. H. Gotla [1985] 156 ITR 323 (SC); Addl. CIT vs. Surat Art Silk Cloth Manufacturers Association [1980] 121 ITR 1 (SC), besides in the case of K. P. Varghese (supra), also concluding the matter. The gist thereof, or atleast to a substantial extent, stands in fact already brought out in the earlier part of this order while discussing the several arguments urged before us. All that is logical relevant, yielding insight into the purpose and object for and toward which the amendment stands brought, should be admissible. A casus omissus cannot be readily inferred, and the courts eschew supplying the same except in the case of clear necessity. The court cannot read anything into a statutory provision which is plain and unambiguous; a statute being an edict of the Legislature. The language employed in a statue is a determinative factor of the legislative intent, the foundational basis of any interpretation, is to be found from the words used by the Legislature itself. The principle is in fact well settled and trite (refer Padmasundra Rao and others vs. State of Tamil Nadu [2002] 255 ITR 147 (SC); and Britannia Industries Ltd. vs. CIT [2005]

278 ITR 546 (SC). As explained in Surat Art Silk Cloth Mfrs. Assoc. (supra) (pg.17), the consequences cannot alter the meaning of a statutory provision where such meaning is plain and unambiguous, though could certainly help to fix its meaning in case of doubt and ambiguity. The amendment/s under reference, as explained in the Finance Minister's speech itself while introducing the provision, follows the abolition of the Gift Tax Act which, as also observed earlier, sought to bring the difference in the consideration to tax in the hands of the donor. That the said Act, together with the Wealth Tax Act and the Act form an integrated code is well settled. 'Income' under the Act, it is again well settled, is a word of widest amplitude, and could include gains derived in any manner. To our mind, therefore, the provisions/s, though no doubt a charging provision, is an extension of the deeming provisions of Chapter VI of the Act, laying down the statutory rules of evidence, incorporating the principles of common law jurisprudence. In sum, as also in fine, the provision, brought as an abuse measure, only seeks to tax the understatement in consideration as the income in the hands of the recipient (of the corresponding asset) as against the donor in the case of Gift Tax Act, since no longer in force, particularly considering the burden that the Revenue would otherwise be called upon to discharge, i.e., to prove otherwise, even as the receipt of the asset by the assessee is established. No ambiguity or absurdity or unintended consequence has been either observed by us or brought to our notice, even as we have endeavoured to examine the provision from all angles; it being well excepted, also excluding cases of business reorganization. The provision is well founded, even as it is settled that hardship in a case would not by itself lead to supplying casus omissus or reading down the provision. In fact, we have also observed the same to be in accord with the trend in the legislative field in the recent past where in view of the increasing complexity of business or economic transactions, fair market value, also providing rules for its determination, is being increasingly adopted for uniform application as a basis for commercial transactions for the purpose of taxing statutes. The reliance on the argument made in this regard would thus be of no assistance to the assessee. No property however being passed on to the assessee in the instant case, i.e., on the allotment of the additional shares, no addition in terms of the provision itself shall arise in the facts of the case. We accordingly answer the question raised at the beginning of this order (refer para 2) in the negative.

Decision

5.1 In view of the foregoing, therefore, the provision of s. 56(2)(vii)(c), in the facts and circumstances of the case, shall not apply and, hence, the amount of Rs.27,89,02,160/- cannot be assessed as income in the hands of the assessee on the ground of inadequate consideration. This answers ground nos. 2 to 4. Ground # 1 stands dismissed as not pressed. We decide accordingly.

5.2 The assessee has also moved a stay application. In view of our having decided the appeal itself, the same becomes infructuous."

10. We also found that CIT(A) has also dealt with each and every objection of the AO as well as the order of the Tribunal in case of brother of assessee for the A.Y.2010-11 having similar facts, deleted the addition so made. A detailed finding recorded by CIT(A) are as per material on record. Respectfully following the order of the Tribunal in the case of brother of assessee having similar facts, we do not find any reason to interfere in the finding of CIT(A).

11. In the result, appeal of the Revenue is dismissed.

12. From the record we found that the assessee is an individual and a resident of India. He is one of the promoters of a company namely, Dorf Ketal Chemicals India Private Limited ("the company") and is also a director in the company. The appeal relates to the assessment year 2010-11. As on 1 April, 2009 the assessee held 1,04,179 shares in the company, which was equivalent to 34.57% of the total issued share capital of the company. The company has a wholly owned subsidiary in United States of America namely, Dorf Ketal Speciality Catalyst LLC ("the subsidiary"). During the year under consideration, the subsidiary intended to acquire the chemical business of Du Pont Inc., USA. To finance the acquisition, the subsidiary entered into a loan agreement. The loan agreement required the promoters of the company to increase the total net worth of the company to Rs. 150 crores by 31 March 2010.

13. In order to comply with this covenant in the loan agreement, the board of directors of the company passed a resolution on 7 September, 2009 to issue 63,00,000 shares at the face value of Rs 100 to the existing shareholders in proportion to their holding in the company so as to increase the share capital by Rs 63 Crores. On the same day, i.e. 7 September, 2009 an offer letter was circulated by the company to the existing shareholders. Based on the existing shareholding of 34.57%, the assessee was offered 21,78,204 shares at face value of Rs. 100. The assessee accepted the part offer of the shares of only to the extent of 20,94,032 shares. On 21st September, 2009 the company informed its shareholders about the acceptance by them of the shares offered by the company.

14. From the record we also found that the shares were formally allotted by the company on 28 January, 2010 pursuant to the acceptance by the shareholders of the offer made to them in September, 2009. As the assessee only partly accepted the shares offered to him, his shareholding came down from 34.57% to 33.30%. Post the acceptance by the shareholders of the company of the shares offered to them by the company the value of each share of the company was Rs. 184 per share. The assessee filed his return of income for the assessment year 2010-11 declaring total income of Rs. 25,04,16,549. The Assessing Officer passed

an order dated 28 March 2013 under section 143(3) of the Act making an addition of Rs. 3,01,25,58,196 under section 56(2)(vii)of the Act.

15. Now, we deal with the contention of learned DR. As per learned DR the provisions of section 56(2)(vii) are applicable to the transaction as there has been disproportionate allotment in the case of the assessee. The assessee was offered 21,78,204 shares however, subscribed only to 20,94,032 shares. Therefore as held by the Tribunal at Para 4.3 in the case of Sudhir Menon (HUF) *(supra),* the provisions of section 56(2)(vii) are applicable when there is disproportionate allotment. He further submitted that the provisions of section 56(2)(vii) are in the nature of anti-abuse provisions and therefore should be interpreted strictly. In this regard, the Department relied on the Circular No. 1/2011 dated 6 April, 2011 and the decisions of the Tribunal in case of Rain Cement Limited vs. DC IT (2017 1 NYPTTJ 362 HYD) and Instrumentarium Corporation Ltd. (2016 (7) TMI 760 - ITAT Kolkata) wherein it was held that the transfer pricing provisions being anti abuse provisions are to be interpreted strictly. While deciding the issue, the CIT(A) has referred to the earlier decision of the Income-tax Appellate Tribunal dated 12 March, 2014 in the case of Sudhir Menon (HUF) (which decision appears at pages 36 to 57 in the paper book). He concluded that the facts in the case of Sudhir Menon (HUF) and the assessee were identical and summarized the findings of the Tribunal in para 14.2 of his order (pages 23-24 of his order). In para 14.3 of his order the Commissioner of Income-tax

extracted from para 4.3 of the Tribunal's order. In the said para 4.3. the Tribunal has observed "as long as, therefore, there is no disproportionate allotment, that is, shares are allotted pro rata to the shareholders based on the existing holdings, there is no scope for any property being received by them on the said allotment of shares, there being only an apportionment of the value of the existing holding over a larger number of shares. There is accordingly no question of section 56(2)(vii)(c) though per se applicable to the transaction i. e., all this genre getting attracted in such a case. A higher than proportionate or non-uniform allotment though would and on the same premise attract the rigour of the provision. It is clear that as per the Tribunal it is only when a higher than a proportionate allotment is received by a shareholder the provisions of section 56(2)(vii) get attracted. In the instant case, the assessee applied for and was allotted a lesser than the proportionate shares offered to him. It is clear that earlier reference to "disproportionate allotment" means disproportionate to the extent the allotment is higher than the proportion offered.

16. We had carefully gone through the order of the Tribunal in case of Subhodh Menon HUF, wherein the shareholding of the assessee reduced from 4.98 to 3.17% has held that no property is received by the assessee in as much as the assessee and assessee has become poorer as the value of his shareholding declined. The shareholding of Sudhir Menon (HUF) had reduced by virtue of rights issue from 4.98% to 3.17% (the

assessee's shareholding reduced from 34.57 to 33.30%). Ultimately in paragraph 14.4 of his order he concluded, "considering the fact that the issue involved is identical in the case under consideration as well as in the case of Sudhir Menon (HUF) for the A. Y. 2010-11, following the decision of Hon'ble ITAT, Mumbai, it is hereby held that the provisions of section 56(2)(vii)(c) of the Act is not applicable to the facts and circumstances of the assessee's case.

17. We further observe that provisions of section 56(2)(vii) does not apply to bonafide business transaction. As explained hereinabove, shares were issued by the company to comply with a covenant in the loan agreement with State Bank of India which required the promoters to increase the total net worth of the company to Rs. 150 crores by 31 March, 2010. Therefore, the shares were issued by the company for a bonafide reason and as a matter of business exigency. Circular No.1/2011 dated 6 April, 2011 issued by the CBDT explaining the provision of section 56(2)(vii) specifically states that the section was inserted as a counter evasion mechanism to prevent money laundering of unaccounted income. In paragraph 13.4 thereof where it is stated that *"the intention was not to tax transactions carried out in the normal course of business or trade, the profit of which are taxable under the specific head of income".*

18. In the instant case, the transaction of issue of shares was carried out to comply with a covenant in the loan agreement with the bank to

fund the acquisition of the business by the subsidiary in USA, therefore, such a bonafide business transaction cannot be taxed under section 56(2)(vii) of the Act especially when there is not even a whisper about money laundering by the AO in the assessment order. Further, we observe that the consideration for the shares was received through banking channel. This object behind introduction of section 56(2)(vii) should be borne in mind. In this regard, reliance may be placed on the Judgment of Supreme Court in the case of ITO vs. K P Varghese (131ITR 597) wherein the Apex Court at Page 609 in the context of section 52(2) of the Act held as under:

> *"The object and purpose of sub-section (2), as explicated from the speech of the Finance Minister, was not to strike at honest and bona fide transactions where the consideration for the transfer was correctly disclosed by the assessee but to bring within the net of taxation those transactions where the consideration in respect of the transfer was shown at a lesser figure than that actually received by the assessee, so that they do not escape the charge of tax on capital gains by understatement of the consideration. This was real object and purpose of the enactment of sub-section (2) and the interpretation of this sub-section must fall in line with the advancement of that object and purpose. We must, therefore, accept as the underlying assumption of sub-section (2) that there is understatement of consideration in respect of the transfer and sub-section (2) applies only where the actual consideration received by the assessee is not disclosed and the consideration declared in respect of the transfer is shown at a lesser figure than that actually received."*

19. In view of the above, the provisions of section 56(2)(vii)cannot be applied to transaction under consideration.

20. Moreover, the provisions of section 56(2)(vii) are applicable only from 1st October, 2009. In the instant case, the offer was made by the

company to the shareholders to subscribe for the shares on 7 September, 2009 pursuant to resolution passed by board of directors on the same date. Further, on 21st September, 2009, the company informed the shareholders about the acceptance of shares offered by the company. Therefore, the offer made by the company was accepted by the shareholders before 1st October, 2009 hence, the contract between the company and the shareholder for issue by the company of shares was completed before 1st October, 2009. Accordingly, the provisions of section 56(2)(vii) do not apply to as the contract was executed prior to 1st October 2009. It was only the formal routine act of issuance of the share certificate by the company which took place after 1 October, 2009. The revenue has also relied on the provisions of section 17 that there would be a tax liability under section 17, even if section 56(2)(vii) does not apply, as the assessee being an employee of the company. The allotment of shares by the company the holding of the assessee came down from 34.57% to 33.30%, i.e., shareholding of the assessee witnesses a decline after the shares were allotted by the company, no benefit was received by the assessee and therefore, even the provisions of section 17 of the Act are not applicable.

21. Furthermore, the provisions of section 17 do not apply to the shares allotted by the company to the assessee as the shares were not allotted by the company to the assessee in his capacity of being an employee of the company. The shares were offered and allotted to the

assessee by the company by virtue of the assessee being a shareholder of the company. Therefore the provisions of section 17 are not applicable. Circular No. 710 dated 24 July, 1995 also supports the assessee's stand that where shares are offered by company to a shareholder, who happens to be an employee of the company (as Mr. Subodh Menon indeed is), at the same price as have been offered to other shareholders or the general public, there will be no perquisite in the shareholder's hands. In the instant case, the shares were offered to the assessee and other shareholders at a uniform rate of Rs. 100 and therefore, the difference between the fair market value and issue price cannot be brought to tax as a perquisite under section 17 of the Act.

22. In view of the above, we do not find any infirmity in the order of CIT(A).

23. In the result appeal of the Revenue in ITA No.676/Mum/2015 is dismissed.

ITA No.2776/Mum/2015 (A.Y.2010-11)

24. Facts and circumstances in the case of P.N.Ramaswamy in ITA No.2776/Mum/2015 are same as discussed hereinabove, following the reasoning given hereinabove, we do not find any reason to interfere in the order of CIT(A).

25. In the result appeal of the Revenue in ITA No.2776/Mum/2015 is dismissed.

26. In the result both the appeals filed by Revenue are dismissed.

Order pronounced in the open court on this 07/12/2018

Sd/-	**Sd/-**
(RAM LAL NEGI)	**(R.C.SHARMA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai; Dated 07/12/2018
Karuna Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

सत्यापित प्रति //True Copy//

(Asstt. Registrar)
ITAT, Mumbai